Supreme Court, U.S.
FILED
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ANTHONY SHORT

Petitioner

v.

EDISON CHOUEST OFFSHORE, INC. ET AL

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a Jones Act seaman entitled to have his maritime personal injury action adjudicated pursuant to Federal Jones Act and General Maritime Law principles rather than the unique law applied in this case by the Alabama Supreme Court.

2. Is uniformity of law required among the various courts of this country in Jones Act and General Maritime Law cases.

LIST OF THE PARTIES

Edison Chouest Offshore, Inc.

Galliano Marine Service, Inc.

Grand Isle Offshore, Inc.

Holiday Offshore, Inc.

North America Boat Rentals, Inc.

North American Towing, Inc.

Anthony E. Short

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CITATIONS TO OPINIONS BELOW

The decision from which Petitioner seeks relief is officially reported as Anthony Short v. Edison Chouest Offshore, Inc. et al, _____ So.2d _____(Ala. 1994, Case Number 1921522). That Opinion is set out as Exhibit A of the Appendix. Since the Alabama Supreme Court simply adopted and quoted as its own in toto the Order of the Mobile County, Alabama Circuit Court granting Summary Judgment in favor of Respondent and against Petitioner, that Order is not copied, but reference is made to the Alabama Supreme Court Opinion cited above.

STATEMENT OF THE GROUNDS FOR JURISDICTION

The Judgment of the Alabama Supreme Court was rendered on February 4, 1994. An Order denying a rehearing was entered on March 18, 1994.

The jurisdiction of this Court is invoked under 18 U.S.C. Sec. 1257, 28 U.S.C. Sec. 1333, and Supreme Court Rule 10.

STATUTORY PROVISIONS INVOLVED

The Jones Act, 46 U.S. Code, Sec. 688.

STATEMENT OF THE CASE

This is an Admiralty action. The Petitioner, Anthony E. Short, is a seaman who worked for fifteen years in the exclusive employ of respondents. During those fifteen years Petitioner, in the course of his employment, was exposed to numerous known and unknown chemicals while engaged in cleaning chemical tanks as a seaman on Respondents' vessels. As a result of such exposure to various chemicals, Mr. Short developed occupational induced asthma and is now totally disabled.

Petitioner filed an action under the Jones Act and General Maritime Law on May 11, 1992, in the Alabama State Court at Mobile, Alabama, under the Savings to Suitors Clause of the U. S. Constitution, with jury trial as to all issues demanded. The complaint states that as a seaman, Mr.

Short was engaged as a part of his duties in cleaning by broom sweeping and other methods, various chemicals from cargo tanks without being furnished proper respirators or chemical dust masks, that he was exposed to large quantities of various chemical dusts, sprays, mists and fumes in his work onboard the Respondents' vessels and the exposure to the various chemicals resulted in the development of his disabling occupational asthma. The complaint further alleged that in requiring Plaintiff to work in chemical and dust laden atmospheres without proper respiratory protection, Respondents were negligent and negligently failed to provide a safe place to work or seaworthy vessels. The complaint also sought maintenance and cure.

After substantial discovery, the Respondents filed a Motion for Summary

Judgment supported by the deposition of treating physician Dr. Gaeton D. Lorino, expert Dr. Richard Deshazzo and affidavits by two of Respondents' employees.

Mr. Short filed a Response and Memorandum in Opposition to the Motion for Summary Judgment and demanded oral argument, supported by deposition and affidavit of treating physician Dr. Gaeton D. Lorino, excerpts from the deposition of Defendants' Safety Manager, deposition of a fellow employee David Nelams, affidavit of Mr. Short, and excerpts and exhibits attached thereto, including various Material Safety Data Sheets prepared according to applicable laws showing the health hazards of some of the chemicals to which he was exposed during the course of his employment, a description of the inadequate respiratory protection provided, and the

affidavit of expert Lessard. There were various other affidavits and depositions before the court from previous proceedings.

The defendants' motion for summary judgment was set for oral argument on Friday, June 18, 1993, but notwithstanding, the Court entered an Order granting the motion without notice to plaintiff or counsel, entering a Final Judgment against petitioner Short on June 16, 1993. On June 18, 1993, plaintiff filed a motion to vacate the order on summary judgment and requested oral argument, which motion together with a subsequent motion to vacate was summarily denied without oral argument, from which Mr. Short filed a Notice of Appeal to the Alabama Supreme Court on July 9, 1993, and requested oral argument.

The summary judgments granted by the trial court were affirmed without oral

argument on February 4, 1994, and an application for rehearing was denied on March 18, 1994.

The Alabama Supreme Court had before it the uncontradicted testimony of Mr. Short's treating physician, who stated his opinion to a reasonable degree of medical certainty that Mr. Short has occupational asthma caused by his exposure to various chemical dusts, mists and fumes while working on respondent Edison Chouest vessels, that he was exposed to those chemicals for fifteen years without proper respiratory protection, and that the various chemicals to which Mr. Short was exposed were allergens known to cause occupational asthma, and that many of the chemicals to which he was exposed were shown on the product data sheets to be asthma triggers, and that anyone exposed to

such chemicals in high concentrations over an extended period of time such as the time Mr. Short worked for respondents, would be susceptible to developing occupational asthma.

The doctor went so far as to say that in his opinion the materials to which Mr. Short was exposed during the 15 years that he worked for respondents did cause Mr. Short to develop occupational asthma, that no one single chemical can be singled out as "the cause" of such occupational asthma, although the list of chemicals contained in Mr. Short's affidavit, contained several which are known to trigger asthma and which are known to have caused occupational asthma.

The doctor continued by stating that it was the totality of the exposure over a period of years to the large quantities of

various known and unknown chemicals which resulted in Mr. Short's occupational asthma. In the doctor's opinion it would be impossible to determine the exact chemical that triggered the illness. The doctor further testified that many of the various chemicals to which Mr. Short was known to have been exposed while in the employment of the respondents were not harmless substances if breathed over a period of time in heavy concentrations and in his opinion the various chemical dusts, mists, or any one of them, to which Mr. Short was exposed in the course of his employment with Edison Chouest <u>was the causative agent of his occupational asthma.</u>

There was also before the court testimony that for approximately fifteen years Mr. Short was supplied with insufficient respiratory protection, that no

respiratory protection program was set up by respondents, that respondents did not know to what chemicals their employees were exposed and the court had before it the testimony of Safety Consultant Lessard that failure to provide proper dust protection for tank cleaning was an actual violation of numerous OSHA and U.S. Coast guard regulations.

There were no facts before the court that contradict Dr. Lorino's sworn opinion that the chemicals breathed by Tony Short in heavy concentrations during 15 years of work onboard respondents' vessels did cause his occupational induced asthma and that such chemicals were not harmless when breathed in substantial quantities. There were no facts before the court upon which the court could have found that the chemicals breathed by Mr. Short were

"harmless substances."

Notwithstanding that there is ample Federal law on all aspects of Mr. Short's claim, the Alabama Supreme Court fashioned a unique theory in approving the dismissal by summary judgment of Mr. Short's Jones Act and General maritime Law claim, which theory stated that the seaman, despite the medical testimony as stated above, had no cause of action unless that seaman could identity the single substance which triggered his occupational asthma and that the respondent vessel owners must have known prior to exposing Mr. Short to the chemical that such single chemical could cause occupational asthma or was harmful. In addition, the Alabama Supreme Court applied Alabama products liability law rather than applicable maritime law principles.

ARGUMENT AND

CITATIONS OF AUTHORITIES

The fundamental principle of maritime law is that a seaman is a "ward of the court" for which the Jones Act, 46 U.S.C.A. Section 688, was passed as remedial and welfare legislation creating rights for the seaman for damages arising from maritime torts. The statutory scheme, together with existing general maritime law was and is the only form of workers personal injury compensation available to a seaman and was intended to give protection to that class of individuals and to those dependent upon their earnings. Cosmopolitan Shipping Company v. McAllister, 337 U.S. 783, 93 L.Ed. 1692, 69 S.Ct. 1317 (1949); Cortez v. Baltimore Insular Line, Inc., 287 U.S. 637, 77 L.Ed. 368, 53 S.Ct. 173 (1932).

Since the statutory and general maritime law compensation scheme for seamen is an exclusive and comprehensive remedy, an injured seaman should be able to go to any jurisdiction in the country and have his Jones Act/General Maritime Law claims adjudicated pursuant to the same substantive law and burdens of proof. If the Courts of the State of Alabama fail to follow the Jones Act as mandated by Congress and the General Maritime Law as enunciated by this Court, to the detriment of the seaman's rights, this Court should allow certiorari so as to insure the uniform treatment of seamen.

This Court is the only forum available for a seaman who is seeking to require the highest court of his home state to apply to him the same standards and laws applied to seamen by other forums.

The medical evidence in this case is uncontested. Anthony Short was exposed to large quantities of various chemicals, including cement dust, for some fifteen years while employed by Edison Chouest. Competent doctors have diagnosed Mr. Short as having "occupational asthma," resulting from his exposure to the various chemicals and dusts to which he was exposed while in the respondent shipowners' employ.

The law is well established that if there is any evidence that the vessel owner/employee has failed to provide a safe place to work and there is some proof of circumstances from which it can be reasonably inferred that the injury resulted from that failure, then Mr. Short having demanded a jury trial, is entitled to a jury trial. Schulz v. Pennsylvania Railroad Company, 350 U.S. 523, 100 L.Ed.

668, 76 S.Ct. 668 (1956).

This Court had before it a very similar case in Sentilles v. Inter-Caribbean Shipping Corporation, 361 U.S. 107, 4 L.Ed.2d 142, 80 S.Ct. 173 (1959) in which this Court specifically held that if there are several potential medical causes for a seaman's tuberculosis, any one of which can be attributed to the vessel, then the seaman has a cause of action which goes to a jury. The seaman does not have to show that a single instance or exposure from multiple possible causatives was the single cause of his injury.

The Alabama Supreme Court required a different and substantially higher burden in that the Alabama Supreme Court required that Anthony Short show which of the myriad of chemicals to which he was exposed was the cause or trigger of his asthma. That

increased burden is not merely a procedural difference from existing law as applied by this Court, but is new law unique to the State of Alabama.

Mr. Short's treating physician testified that he was convinced to a reasonable degree of medical certainty that Mr. Short was suffering from occupational asthma as a result of working on defendants' vessels (R. 454-455) and that there was a reliable history of Mr. Short's exposure to various chemicals (R. 488), that it was not necessary to identify a specific causative substance to diagnose occupational asthma and as a medical fact you cannot identify a specific substance as the trigger. (R. 450-451). The requirement by the Alabama Supreme Court that a seaman identify the specific substance onboard the vessel was apparently the result of a

mistaken impression that there could be no liability upon a shipowner unless the shipowner had actual advance knowledge of the onset of Anthony Short's occupational asthma; that the various chemicals to which the seamen employee was exposed, was a likely occupational asthma trigger, and that absent such advance knowledge there could be no liability. The application of the Alabama standard deprived Anthony Short of his seaman's workers compensation remedy.

Liability based upon unseaworthiness is wholly distinct from liability based upon negligence. Seas Shipping Company v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946); Usner v. Luckenbach Overseas Corporation, 400 U. S. 494, 91 S.Ct. 514, 27 L.Ed. 562 (1971). Unseaworthiness is a condition and whether

a shipowner had advance knowledge that a condition created by him might trigger disabling occupational asthma in one of his seamen is irrelevant to the owner's liability. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed. 941 (1960); Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944).

The failure of a shipowner to provide a crew of a vessel with a reasonably safe place within which to work gives rise to a cause of action under the Jones Act. Beadle v. Spencer, 298 U.S. 124, 80 L.Ed. 1082, 56 S.Ct. 712 (1936); Mahnich v. Southern S.S. Co., supra. Since Mr. Short was exposed for years to various chemical dusts without proper respiratory protection or a safety program in place to assure such respiratory protection, then the fact that

the shipowner did not have advance knowledge that one of the substances, or some combination of such could trigger asthma, does not mean that the seaman ipso facto loses his Jones Act remedy. The Alabama Supreme Court, in paragraph 7 of its Opinion, specifically stated that the law as applied by the court of Alabama, required that a seaman must identify a substance onboard defendant's vessel which substance was the causative agent of his occupational asthma before he can proceed under the Jones Act. That grossly increased burden effectively eliminated plaintiff's Jones Act remedy in Alabama, given the nature of his occupational illness.

The Alabama Supreme Court, notwithstanding the large body of Admiralty law available to it, also applied its own

version of product liability law to this seaman's claim. Although State law may supplement Maritime law where Maritime law is silent, Continental Oil Company v. Bonanza Corp., 677 F.2d 455, 461 (5th Cir. 1982), on rehearing 706 F.2d 1365 (1983) (en banc) or where a local matter is at issue, Kamani v. Port of Houston Authority, 702 F.2d 612, 614 (5th Cir. 1983), State law may not be applied where it would conflict with Maritime law. Powell v. Offshore Navigation, Inc., 644 F.2d 1063, 1065 (5th Cir. 1981), cert.den. 454 U.S. 972, 102 S.Ct. 521, 70 L.Ed.2d 391 (1981); Coastal Iron Works, Inc. v. Petty Ray Geophysical, 783 F.2d 577 (5th Cir. 1986).

This Court should accept certiorari to review the application of products liability law to a seaman's case. It is one thing for one or two individuals only

to complain of some adverse reaction to a highly popular brand of toothpaste. It is another matter entirely to apply those same principles of law to a seaman who is totally disabled as a result of harmful chemicals used in cleaning tanks on vessels and thereby deprive him of a valuable property right, i.e. his remedies under the Jones Act and General Maritime Law.

CONCLUSION

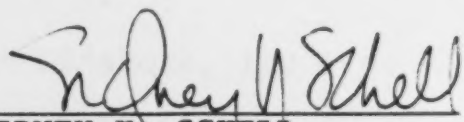
Petition does not ask this Court to grant certiorari to review evidence and discuss specific facts, or to weigh evidence in relation to specific facts. This petition asks this Court to give a measure of guidance to the Alabama Supreme Court so that uniformity remains among the various courts of the country in that special class of cases arising under the Jones Act and its Siamese twin, the

seaworthiness remedy. Sentilles v. Inter-Caribbean Shipping Co., supra, provides the precedent for this petition.

The only compensation remedy available to Anthony Short, a young man with a young family, now totally disabled, is his Jones Act General Maritime Law remedy. Mr. Short filed his claim in his State Court under the Savings to Suitors Clause of the U. S. Constitution, with the expectation that his case would be tried under the same laws and rules as if it had been filed in a Federal Court or in some other state court. Mr. Short was mistaken, and to his surprise and chagrin, the Alabama Supreme Court applied its own unique brand of law to his seaman's claims.

Certiorari should be granted to consider if there was indeed sufficient variance from the uniformity requirements

of Admiralty and Maritime Law to require a reversal, with instructions as to the proper law to be applied in this case, thus insuring that a seaman shall find the same law applied to his seaman's claims regardless of the forum in which such claim is filed.



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APPENDIX A

OPINION OF

SUPREME COURT OF ALABAMA

1921522

Anthony Short

v.

Edison Chouest Offshore, Inc., et al

Appeal from Mobile Circuit Court
(CV-92-001715)

STEGALL, JUSTICE.

The plaintiff, Anthony Short, appeals from a summary judgment entered in favor of the defendants in an action alleging liability under general maritime law and under the Jones Act for injuries Short claimed to have sustained during the course of his employment with the defendants. Short argues that the trial court resolved disputed facts and made findings of fact in

connection with the summary judgment and, therefore, that the trial court erred in entering the summary judgment in favor of the defendants.[1]

In its summary judgment order, the trial court stated:

> "This cause comes before the court on defendants' Motion for Summary Judgment. After considering all pleadings and other materials filed with the court, including defendants' brief in support of their Motion for Summary Judgment and plaintiff's brief in opposition thereto, the court makes the following findings of fact and conclusions of law.
>
> "FINDINGS OF FACT
>
> "1. The plaintiff is a resident of Mobile County and was employed by defendants from approximately 1977 through 1992. From 1978

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[1] The trial court's order, quoted at length in this opinion, names only one of the several defendants. The others are companies related to the one named.

through 1992, plaintiff was employed by defendant Edison Chouest Offshore, Inc. (hereinafter 'Chouest') Plaintiff served aboard Chouest boats in the capacities of mate and captain. (Plaintiff's deposition, pp. 7, 81, 85).

"2. During 1991, the plaintiff developed a physical condition characterized by dyspnea, shortness of breath and related respiratory symptoms, which first manifested itself while the plaintiff was ashore at an Exxon facility in Grand Isle, Louisiana. (Plaintiff's deposition, p. 61.)

"3. In April, 1992, the plaintiff's physician, Dr. Gaeton Lorino, diagnosed his condition as occupational asthma (Lorino deposition, p. 93.), a disease which, according to both Dr. Lorino and Dr. Richard D. deShazo, whose affidavit was submitted by the defendants, is an allergic disease. (deShazo affidavit, ¶ 3; Lorino deposition, p. 83) Specifically, according to Dr. deShazo, 'occupational asthma ... is a lung disease caused by the abnormal function of an individual's immune system and is, therefore, characterized as an allergic disease.' (deShazo

affidavit, ¶ 3.) Dr. deShazo further states that '[a]lleric asthma occurs when a harmless substance (for instance, pollen) is misperceived by the immune system as a pathogen. Thus, the immune system reacts to a harmless substance as it would to an actual pathogen by production of antibodies such as IgE, which is an abbreviation for immunoglobulin E.' (deShazo affidavit, ¶ 5.)

"4. Dr. Lorino, who made the diagnosis of occupational asthma, attributes the plaintiff's disorder to an allergic reaction to substances aboard the boats on which the plaintiff worked. (Lorino deposition, p. 83.)

"5. Significantly, neither the plaintiff nor his physician can identify any substance aboard defendants' vessels which caused this condition. Neither can the plaintiff or his physician identify the time or place of the plaintiff's exposure to any such unidentified substance. In fact, Dr. Lorino stated in his deposition that he did not 'know of any specific substances or names that [the plaintiff] was exposed to.' (Lorino deposition, p. 87.)

"6. If the plaintiff does in fact suffer from occupational asthma, then his condition was

caused by an abnormal, i.e., allergic response of the plaintiff's body which occurred as a result of exposure (at times unknown) to an allergen (which also is unknown). (Id.)

"7. The allergic condition of occupational asthma occurs infrequently and is found in only an exceedingly small percentage of the population. (deShazo affidavit, ¶ 7); Lorino depsition, p. 64.) Although the figures given by each of the doctors vary slightly, it is uncontested that occupational asthma is a disease which affects, at most, only one-quarter of one percent of the population. (deShazo affidavit, ¶ 7; Lorino deposition, p. 64.)

"8. Of the approximately three thousand five hundred (3500) or more different individuals who have served as crewmen aboard Chouest boats, only Anthony Short has asserted a claim against Chouest for occupational asthma or any other pulmonary problem during, or as a result of, service on Chouest boats. (Jack Smith affidavit, ¶¶ 2-3; Stacey Gisclare affidavit, ¶ 2.)

"CONCLUSIONS OF LAW

"1. Under the doctrine of unsea-

worthiness, a vessel owner is obligated to furnish a vessel and appliances which are reasonably proper and suitable for their intended use. Complaint of Merry Shipping, 650 F.2d 622 (5th Cir. 1981).

"2. Although the obligation imposed under the doctrine of unseaworthiness is absolute, it is an absolute obligation only to furnish a vessel and appliances which are reasonably fit. Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 322 (1964). Thus, the doctrine of unseaworthiness does not require that a vessel owner furnish an accident-free or illness-free vessel. Id.

"3. A vessel cannot be deemed not reasonably fit for its intended use, i.e., cannot be deemed unseaworthy, if the vessel is not in some manner defective. See Waldron v. Moore-McCormack Lines, 386 U.S. 724, 726 (1967) (holding that 'the classic case of unseaworthiness arises when the vessel is either insufficiently or defectively equipped'; emphasis added).

"4. For plaintiff to prevail on his claim for unseaworthiness, plaintiff must establish that defendants' vessels or appliances

were in some manner defective, i.e., not reasonably fit for their intended use.

"5. The plaintiff is unable to identify any substance aboard any of defendants' vessels as the causative agent of his occupational asthma, and is thus unable to identify the instrumentality which caused his alleged injury.

"6. Since the plaintiff cannot identify the substance which triggered his occupational asthma, he cannot demonstrate that the presence of a substance constituted a defect aboard any of defendants' vessels. Because he cannot show that any vessel was in any manner defective, the plaintiff cannot demonstrate that any of defendants' vessels were unseaworthy.

"7. Plaintiff's failure to identify any substance aboard any of defendants' vessels as the causative agent of his occupational asthma also prevents plaintiff from prevailing on his claim for negligence. It follows logically that if plaintiff cannot identify any substance aboard any of defendants' vessels as the cause of his alleged injury, he cannot prove that defendants knew or should have known of the presence of any substance aboard

their boats which was supposedly harmful to the plaintiff.

"8. The court, alternatively, concludes that the plaintiff cannot recover from defendants because there can be no recovery for injuries which result from allergic or idiosyncratic reactions to otherwise harmless substances.

"9. The general maritime law is instructed and influenced by the common law, including the law of products liability. See Miller v. American President Lines, Ltd., [989 F.2d 1450] (6th Cir. 1993), [cert. denied, 114 S.Ct. 304 (1993)]. The standard of absolute liability imposed on manufacturers of products is essentially identical to the standard of absolute liability imposed on vessel owners. Given the essential sameness of standards of liability applicable in products liability law and in maritime actions in which recovery is predicated on unseaworthiness, the court may legitimately look to products liability decisions which have applied that standard.

"10. Under the law of products liability, there is no recovery for injuries which result from allergic or idiosyncratic

reactions to otherwise harmless substances. Griggs v. Comb, Inc., 456 So.2d 790 (Ala.1984) (stating that '[i]f the injured person was one who could be described as ultra-sensitive, who suffered an allergic reaction which would be suffered by a very small or insignificant number of people, then the manufacturer would not be held liable'); Gordon v. Proctor & Gamble Distrib. Co., 789 F.Supp. 1384 (W.D. Ky. 1992) (noting that the general rule is 'that a plaintiff's unusual or rare idiosyncratic sensitivity does not provide a basis for recovery under any theory of product liability").

"11. Plaintiff cannot recover for his alleged occupational asthma because the very nature of that condition is an allergic or idiosyncratic reaction to otherwise harmless substances.

"BASED on the foregoing findings of fact and conclusions of law, and having found that there is no genuine issue of fact to be submitted to the trial court, and having concluded that defendants are entitled to [a] judgment as a matter of law, it is hereby:

"ORDERED that defendants' Motion for a Summary Judgment is in all respects GRANTED, and summary

> judgment is hereby ENTERED in favor of defendants, and it is further
>
> "ORDERED, ADJUDGED, and DECREED that the clerk of this court enter a final judgment upon the order herein, whereby the plaintiff shall take nothing from defendants....
>
> "Dated this 16th day of June 1993."

We have reviewed the evidence, the trial court's order quoted above, and the arguments of the parties. The record indicates that there is no genuine issue of material fact and that the defendants were entitled to a judgment as a matter of law. The trial court correctly entered the summary judgment in favor of the defendants. We adopt the trial court's order quoted above as a portion of our opinion.

Short also argues that the trial court erred in failing to provide a hearing on the summary judgment motion, in failing to

give notice that it was taking the summary judgment motion under submission, and in failing to provide a hearing on post-judgment motions. However, because we have concluded that the summary judgment in this case is proper, we hold that any error committed by the trial court in this regard did not prejudice Short and was, therefore, harmless. See Rule 45, A.R.App.P.

AFFIRMED.

Hornsby, C.J., and Maddox, Shores, and Ingram, JJ., concur.

RELEASED

FEB. 4, 1994

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

March 18, 1994

1921522

Anthony Short v. Edison Chouest Offshore, Inc. et al (Mobile: CV-92-001715)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion writtin on rehearing.

STEAGALL, J. - Hornsby, CJ., Maddox, Shores and Ingram, JJ., concur.

(2)

SUPREME COURT, U.S.
FILED
JUL 15 1994
OFFICE OF THE CLERK

No. 93-2034

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ANTHONY SHORT,

Petitioner,

vs.

EDISON CHOUEST OFFSHORE, INC., ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENTS' BRIEF IN OPPOSITION

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SUMMARY OF THE ARGUMENT

I.

THE PETITION FAILS TO PRESENT MEANINGFUL QUESTIONS FOR REVIEW BY THIS COURT AND MAKES NO ATTEMPT TO EXPRESS ITS "QUESTIONS PRESENTED FOR REVIEW" IN THE TERMS AND CIRCUMSTANCES OF THE CASE.

The petition should be denied for failing to comply with substantive rules of this Court which relate to the critical determinations of what questions are presented for review and whether the Court has jurisdiction to review the judgment which Petitioner would bring before it. First, a reading of Petitioner's questions presented for review reveals that Petitioner has failed to comply with the mandate of Supreme Court Rule 14.1(h) to express questions "in the terms and circumstances of the case" and in a manner that is "not . . . argumentative." Petitioner, ignoring that instruction, formulated "questions" which are merely argumentative statements of legal truisms unconnected in any fashion to the facts or ruling in this case. Since the petition fails to inform the Court of any real question for resolution, the petition is due to be denied.

II.

THE PETITION DOES NOT DEMONSTRATE THAT THE "QUESTIONS PRESENTED FOR REVIEW" WERE PROPERLY RAISED AND DISPOSED OF IN THE ALABAMA COURTS "SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THE JUDGMENT ON A WRIT OF CERTIORARI."

Petitioner has also failed to establish that his "questions" were raised in the lower courts. That failure violates Supreme Court Rule 14.1(h) which demands that the petition establish when and how the questions of which Petitioner seeks review were raised in the courts below and how those lower courts passed on them. Petitioner's failure to establish not only when and how, *but indeed whether* his "questions" were raised below prevents this Court from determining whether it has "jurisdiction to review the judgment on a writ of certiorari." Therefore, the petition is due to be denied.

III.

THE PETITION SEEKS ONLY A FACTUAL REVIEW.

An additional reason for the denial of this petition is that the issue actually presented for resolution is factual, not legal. Supreme Court Rule 10 establishes that the discretionary writ of certiorari is reserved for those cases which would present "important" legal questions of "federal" law. And, this Court has made clear that it is a court of law, distinguishing itself from "a court for correction of errors in fact finding." Goodman v. Lukens Steel Co., 482 U.S. 656, 665 (1987). Notwithstanding, it is precisely an issue of fact which this Court would be called upon to resolve if this petition were granted. In an unarguable conclusion of law, the trial court below concluded:

> For [Petitioner] to prevail on his claim for unseaworthiness, [Petitioner] must establish that [Respondents'] vessels or appliances were in some manner defective, i.e., not reasonably fit for their intended use.

Appendix A to Petitioner's brief, pp. 29, 30. The trial court then found that the Petitioner had failed to produce sufficient evidence to create a jury question on that material element, i.e., the existence of a defect. Being unable to assail the legal conclusion regarding defect, the Petitioner would have this Court evaluate the trial court's finding regarding his evidence. This Court, however, "[should] not grant certiorari to review a decision that turns solely upon an analysis of facts, or to determine whether the evidence supports a judgment of a [trial] court." 13 James W. Moore et al., Moore's Federal Practice § 810.41 (2d ed. 1993). Thus, this petition should be denied.

IV.

THE ACTUAL RULING OF THE ALABAMA COURTS, AS DISTINGUISHED FROM THE PETITIONER'S MISREPRESENTATION OF THE RULING, IS BASED ON EMINENTLY CORRECT PRINCIPLES OF LAW.

The petition is also due to be denied for the reason that the actual ruling which this Petitioner would bring before this Court is based on eminently correct principles of law. In fact, a comparison of the petition and the actual ruling of the Alabama courts (which appears in Appendix A to Petitioner's brief) reveals that the Petitioner does not attack the actual ruling. The Petitioner, for instance, complains that the Alabama courts required him to "identify the single substance which triggered" his alleged illness. (Petitioner's brief, p. 11 (emphasis in original)). In truth, however, the Alabama courts came to the unarguable conclusion that a vessel cannot be deemed unseaworthy "if the vessel is not in some manner defective." This Court's decision in Waldron v. Moore-McCormack Lines, 386 U.S. 724 (1967) was cited in

support of that holding. Thus, the true holding of the Alabama courts was that the concept of defect is inherent in the doctrine of unseaworthiness. Again, it is the courts' finding regarding the insufficiency of Petitioner's evidence which Petitioner would have this Court evaluate. And, contrary to Petitioner's assertions, the trial court's actual finding was that Petitioner's claim failed for the reason that he was unable to identify *any* defect aboard any of Respondents' vessels as the causative agent of his illness. That is, the trial court found that Petitioner could not identify so much as one substance as a defect aboard the vessels.

In addition, it is crucial for this Court to note that the Alabama courts did not require a showing of notice of a defect in the context of Petitioner's claim for unseaworthiness. In fact, the notion of notice in the lower courts' ruling applied solely to the negligence claim. This is made clear by express terms in the courts' decision.

Respondents also point this Court to the fact that the petition is based on an affidavit of Petitioner's treating physician which was executed *after* the trial court ruled and entered judgment.

Respondents also note that the trial court's ruling was supported by the *alternative* basis that Petitioner's illness was caused by his abnormal immune system and not by any defect aboard Respondents' vessels. That is to say, due to his abnormal immune system, the Petitioner suffered an idiosyncratic reaction to a substance (he knows not what) that he chanced to encounter (he knows not where or when). The trial court found:

> If the [Petitioner] does in fact suffer from occupational asthma, then his condition was caused by an abnormal, i.e., allergic response of the [Petitioner's]

body which occurred as a result of exposure (at times unknown) to an allergen (which is also unknown).

See Appendix A to Petitioner's brief, pp. 27, 28.

V.

THE PETITIONER MISREPRESENTS THE NATURE OF HIS CLAIMS.

Petitioner's Jones Act and unseaworthiness claims are not analogous to a workers' compensation action. It is the provision of maintenance and cure, not damages under the Jones Act or the doctrine of unseaworthiness, which provides a seaman a workers' compensation remedy. Thus, the Petitioner's discussion of workers' compensation constitutes a misrepresentation of the governing legal standard. The petition is therefore due to be denied.

ARGUMENT

I.

THE PETITION FAILS TO PRESENT MEANINGFUL QUESTIONS FOR REVIEW BY THIS COURT AND MAKES NO ATTEMPT TO EXPRESS ITS "QUESTIONS PRESENTED FOR REVIEW" IN THE TERMS AND CIRCUMSTANCES OF THE CASE.

According to the first of Petitioner's "questions presented for review," he seeks a writ of certiorari in order that this Court might resolve whether a claimant under the Jones Act, 46 U.S.C. § 688 (1982), is entitled to have his case decided under established maritime law

principles rather than erroneous legal principles "unique" to the courts of Alabama. The second "question presented for review" is equally profound. It merely asks whether uniformity of the law is an appropriate goal for courts deciding maritime injury cases. Clearly such "questions" fail to comply with Rule 14.1(a) of this Court's rules which requires that questions presented for review be "expressed in the terms and circumstances of the case" and that they "not be argumentative." The obvious purpose of this Rule is to apprise this Court immediately (indeed, "on the first page following the cover") of the precise legal questions the petition is raising and the factual contexts in which they arise. The Respondents submit that the petition utterly fails to so apprise the Court and for that reason should be denied.

The two "questions" presented neither define a legal issue which this Court (or any court) might review nor are they stated in "the terms and circumstances of the case." In the first question - whether "a Jones Act seaman [is] entitled to have his maritime personal injury action adjudicated pursuant to Federal Jones Act and General Maritime Law principles" - one can only speculate as to the issue the Court is asked to decide. Does Petitioner actually present a question for resolution? If so, what is it and in what context did it arise in this suit?

There can be no doubt that a seaman, or any other plaintiff for that matter, is entitled to have his or her case decided in accordance with established legal principles. The answer to the Petitioner's first question, therefore, is in the affirmative. But having said "yes" to this question, what have we said? We have said nothing actually because we have done nothing more than agree with a truism.

The question is also argumentative because, in its

convoluted style, it says only that the Alabama Supreme Court applied "unique law" (presumably he means erroneous law) in deciding the case before it. But to say nothing more than that the Alabama court should not have applied "unique law" says nothing and does not enlighten this Court on the issues presented for decision.

The second question, which posits uniformity of the admiralty law as a laudable objective, is similarly deficient. It does not present a legal question nor does it demonstrate how this question (whatever it is) arises from the facts of this case. Rather it merely argues that the decision of the Alabama Supreme Court, presumably because it applied "unique law," militated against the jurisprudential goal of "uniformity."

We submit therefore that the Petitioner has failed "to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration" and that this failure clearly constitutes "sufficient reason for denying the petition." Rule 14.5.

Section (h) of Rule 14.1 illustrates the merit of Respondents' argument. That Rule requires the Petitioner to demonstrate that he in fact raised in the state courts below the "federal questions" on which review is sought. One may, therefore, legitimately ask whether, by urging on the Alabama Supreme Court the principle of "uniformity," or by cautioning it against the application of "unique law," the Petitioner actually raised questions of federal law now reviewable by this Court or merely recited unarguable jurisprudential platitudes.

The "questions" in Petitioner's brief do not apprise this Court of any question of federal law for its review nor do they inform Respondents of any issue we must address in

opposing this petition. The "questions" do not present what is "essential to a ready and adequate understanding of the points requiring consideration." Rule 14.5. Thus there are no real questions presented for review and the petition, on this ground alone, should be denied.

II.

THE PETITION DOES NOT DEMONSTRATE THAT THE "QUESTIONS PRESENTED FOR REVIEW" WERE PROPERLY RAISED AND DISPOSED OF IN THE ALABAMA COURTS "SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THE JUDGMENT ON A WRIT OF CERTIORARI."

This petition does not attempt to demonstrate to this Court that it has the requisite appellate jurisdiction and, therefore, should be denied for this reason as well. Supreme Court Rule 14.1(h) mandates that the Petitioner's Statement of the Case "specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised." In addition, the Petitioner must identify "the method or manner of raising [the federal questions sought to be reviewed] and the way in which they were passed upon by [the state courts]." The Petitioner is finally directed to provide "such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears." Demonstrable compliance with Rule 14.1(h) is essential to the granting of a petition because its purpose is to enable this Court to determine whether or not a petitioner has, in the state trial and appellate courts, preserved for appeal the supposed federal questions upon which review is sought.

This Petitioner has ignored altogether the requirements of Rule 14.1(h) thereby making it impossible for this Court to determine whether it has jurisdiction to review the judgment which Petitioner seeks to bring before it. Even careful (and repeated) readings of Petitioner's Statement of the Case fail to reveal at what stage *or even whether* his questions presented for review were raised at trial or on appeal in the Alabama courts. This is not surprising given the fact that Petitioner has not presented any meaningful questions for review. As to Petitioner's first "question," nowhere in the Statement of the Case does he document that he argued to either court that a "Jones Act seaman [is] entitled to have his maritime personal injury action adjudicated pursuant to Federal Jones Act and General Maritime Law principles" rather than by some other law. The same can be said for Petitioner's second "question" which involves the notion of uniformity. And because the Petitioner does not (and cannot) demonstrate that these questions were raised, it follows that he does not (and cannot) specify whether or how the Alabama courts passed upon either of these "questions." As noted above, the Petitioner's "questions" are merely declarations which no court, including those sitting in Alabama, would dispute.

Perhaps the questions of which Petitioner actually seeks review are not those nominally set out as such. Perhaps an actual federal question which this Court might review might be buried elsewhere in the petition. (Such speculation is necessary only because the Petitioner failed to formulate his questions presented for review in accordance with the rules of this Court.) We note for instance that the Petitioner claims in his Conclusion that "Sentilles v. Inter-Caribbean Shipping Co. [sic.], [361 U.S. 107 (1959)], provides the precedent for this petition." Thus, one might speculate, after sifting through the petition, that Petitioner's real grievance is a conflict he

perceives between the ruling of the Alabama courts and this Court's opinion in Sentilles. However, even if this speculation is accurate, the Petitioner has still failed to apprise this Court of whether, when and how Sentilles was raised below and if so, how the Alabama courts passed on it. Moreover, the Petitioner's statement that Sentilles is the "precedent" for his petition is no substitute for a clear and concise statement of the questions presented for review. No prior decision may be transformed into a question for review by its mere citation.

The petition does not show to this Court that it has appellate jurisdiction to review the judgment of the Alabama courts and for that reason is due to be denied.[1]

III.

THE PETITION SEEKS ONLY A FACTUAL REVIEW.

This petition is also due to be denied for the reason that it presents this Court with no legal question - "important," "federal" or otherwise - for resolution. Rather, the Petitioner, unable to dispute the actual and unassailable legal conclusions of the Alabama courts, asks the United States Supreme Court to review a factual finding. Such a task does not warrant the attention of this Court.

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[1]As noted, under Rule 14.5, Petitioner's failure to comply with Rules 14.1(a) and 14.1(h) constitutes sufficient grounds for denial of the petition. In addition, the Petitioner has ignored Rule 14.1(f) which required him to set out verbatim the statutes and constitutional provisions involved in the case. The Petitioner did not set out any statute or constitutional provision, e.g., the Jones Act. While perhaps not dispositive, as are Petitioner's violations of the rules regarding the questions presented for review and jurisdiction, the Petitioner's violation of Rule 14.1(f) illustrates his disregard of what this Court requires of one seeking to obtain its discretionary attention.

Supreme Court Rule 10 makes clear that the discretionary writ of certiorari is reserved for those cases which would present this Court with "important" legal questions of "federal" law. And, as a leading commentator instructs, "[a]n issue of fact is not 'important' for purposes of Rule 10." 13 James W. Moore et al., Moore's Federal Practice ¶810.41 (2d ed. 1993). Goodman v. Lukens Steel Co. illustrates the validity of that instruction. 482 U.S. 656 (1987). In Goodman, this Court identified itself as a "court of law . . . rather than a court for correction of errors in fact finding." 482 U.S. at 665. It is precisely an issue of fact, though, which this Court would be addressing if this petition were granted. A brief review of what transpired below makes this clear. The trial court concluded that the Petitioner, to recover on the doctrine of unseaworthiness, was required to demonstrate a defect aboard one or more of Respondents' vessels. This conclusion of law is unarguable. The trial court, based on hundreds of pages of deposition testimony and various affidavits, then found that the Petitioner failed to produce sufficient evidence to create a jury question on that material element, i.e., the existence of a defect. While the evidence is discussed in succeeding sections of this brief, it is important at this point to understand that it is the lower court's findings regarding the Petitioner's evidence which Petitioner wants this Court to evaluate, not the court's legal conclusion as to the substance of the applicable maritime law.

This "Court [should] not grant certiorari to review a decision that turns solely upon an analysis of facts, or to determine whether the evidence supports a judgment of a [trial] court." 13 James W. Moore et al., Moore's Federal Practice, supra. Nonetheless, the decision which Petitioner desires to bring before this Court is just such a decision. Since the petition seeks only a factual review and does not present a legal question for resolution, the

petition is due to be denied.

IV.

THE ACTUAL RULING OF THE ALABAMA COURTS, AS DISTINGUISHED FROM THE PETITIONER'S MISREPRESENTATION OF THE RULING, IS BASED ON EMINENTLY CORRECT PRINCIPLES OF LAW.

Respondents submit that the Alabama Circuit and Supreme Courts followed eminently correct principles of law in disposing of this case. Indeed, the Petitioner nowhere attacks the real holdings of the trial court and the Alabama Supreme Court. Rather his attack focuses on phantom legal conclusions which neither of the courts below ever made. It will, therefore, be helpful to examine the holdings the Petitioner claims the Alabama courts made and compare them with the courts' actual holdings.

Petitioner, who claims to suffer from an allergic form of asthma, contends in his Statement of the Case that the Alabama courts held that a seaman could have no cause of action against his employer for supposedly contracting occupational asthma, "unless that seaman could identify the single substance which triggered his occupational asthma." (Petitioner's brief, p. 11 (emphasis in original)). Again in his Argument, Petitioner make the same incorrect statement:

> [T]he Alabama Supreme Court required that Anthony Short show which of the myriad of chemicals to which he was exposed was the cause or trigger of his asthma.

Id. at 15 (emphasis in original). Similar misstatements are found on pages 16 and 19 of his brief. All are wrong.

They are gross misrepresentations of the holding of the Alabama Supreme Court.

In truth the court below held that a vessel cannot be deemed unseaworthy "if the vessel is not in some manner defective," citing Waldron v. Moore-McCormack Lines, 386 U.S. 724 (1967). (See Appendix A to Petitioner's brief, p. 29). This is a correct statement of law and significantly one which Petitioner nowhere contests. As this Court said in Waldron, "[a]s regards equipment, the classic case of unseaworthiness arises when the vessel *is either insufficiently or defectively equipped.*" Waldron, 386 U.S. at 726 (emphasis added).

This Court has explained the concept of unseaworthiness also in the following terms:

> Trawler Racer involved the *defective* condition of a physical part of the ship itself. But our cases have held that the scope of unseaworthiness is by no means so limited. A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be *defective,* her appurtenances in disrepair, her crew unfit.

Usner v. Luckenback Overseas Corp., 400 U.S. 494, 499 (1971) (emphasis added) (citations omitted). In other words, the vessel's gear, appurtenances or crew might be defective but it must be shown that *something* about the ship is defective. See also, Reed v. YAKA, 373 U.S. 410, 411 (1963) ("The judge held that the *defective* pallet supplied by Pan-Atlantic rendered Waterman's Yaka *unseaworthy.*" (emphasis added)); Mahnich v. Southern S.S. Co., 321 U.S. 96, 103 (1944) (The staging from which the plaintiff fell was unseaworthy "because of the *defective* rope with which it was rigged." (emphasis added)).

Thus there was nothing "unique" about the Alabama Supreme Court's holding that inherent in the doctrine of unseaworthiness is the concept of a defect. For a vessel to be unseaworthy it must, in some manner, be defective. It may be that she is defective in her gear, her appurtenances or her crew, but she must be defective, and a plaintiff who seeks recovery on the doctrine of unseaworthiness must demonstrate some defect. The court nowhere held that a plaintiff was required to "identify *the* single substance which triggered his occupational asthma" (Petitioner's brief, p. 11 (emphasis in original)), and to so contend is false. Rather the Alabama Supreme Court (and the Circuit Court of Mobile County) held that, "[f]or plaintiff to prevail on his claim for unseaworthiness, plaintiff must establish that defendants' vessels or appliances were in some manner defective." (R.523).

The trial court held, on the basis of the depositions and affidavits before it, that the weight of Petitioner's evidence was insufficient to establish a genuine issue as to any material fact with respect to the existence of a defect or defective condition aboard the Respondents' boats and the Alabama Supreme Court correctly affirmed this determination. This finding was correct because the Petitioner's physician, Dr. Lorino, when he was deposed, had not a clue as to the cause of the Petitioner's condition.

Q. Okay. Now, can you identify the agency [which caused the Petitioner's occupational asthma]?

A. No.

R. 441, 442. The same doctor candidly admitted in his deposition that he did not know any of the substances to which the Petitioner might have been exposed.

Q. . . . Can you, Dr. Lorino, identify in any of these published lists of known occupational allergens any of the things which Mr. Short was exposed to?

A. Unless some of the spray paints contained isocyanates, no, I can't because *I don't know of any specific substances or names that he was exposed to.*

R. 461 (emphasis added). Indeed, the doctor is utterly unaware of the cause of the Petitioner's problems as the following colloquy at his deposition demonstrates:

Q. Well, as I understand it, he said he went down into the tank, so it could be whatever had been carried in the tanks?

A. Right.

Q. Or it could be spray paint which was, spray painting which was going on --

A. In the tanks.

Q. -- in the tanks or on the boat; am I right so far?

A. It could have been. It could have been any of those things.

Q. Or you say it could have been chemicals which were used to clean the inside of the tanks?

A. That's correct.

Q. All right, sir. And I assume it could have been most anything else that happened to have been aboard the boat at that particular time?

I mean what I'm getting at is that we are just in our normal environment are subjected to all sorts of fumes and I don't mean fumes in the sense that, you know, something that you necessarily detect. But as we're sitting here in this room which looks clean to me, we're inhaling all sorts of things, aren't we?

A. Yes.

Q. Okay. So it could be any of those things?

A. Yes, it could be. That's certainly true.

R. 443, 444. When confronted with such testimony the court properly ruled that no genuine issue of fact existed as to the existence of a defect aboard the Respondents' vessels. No plaintiff creates an issue of fact when his treating pulmonologist admits that his respiratory ailment could have been caused by the fumes he encountered in his normal environment. The trial court and the Alabama Supreme Court were thus correct.

It is critical that the trial court's determination as to the insufficiency of Petitioner's evidence related to the material element of the existence of a defect, not to causation. Therefore, the slight or "featherweight" burden of proof is not applicable. Rather, as to the element of defect, the Petitioner was properly held to the typical higher burden of proof. Petitioner's argument that "some proof" or "any evidence" should have sufficed is thus without merit. (Petitioner's brief, p. 14).

Further, and also for the reason that the trial court's ruling was based on the absence of proof of a defect, Petitioner's reliance on Schulz v. Pennsylvania R.R., 350 U.S. 523 (1956) is misplaced. Schulz involved the death

of a tug fireman. The evidence was that the deceased was working on icy decks of unlit tugs on the winter night of his death and that his "half-robed body [was discovered] with a flashlight gripped in his hand." 350 U.S. at 526. *The lower court in Schulz assumed a breach of duty, but concluded that the plantiff had failed to establish proximate cause.* Unremarkably, this Court reversed. Moreover, the question presented in Schulz was one of proximate causation, not of the existence of a defect to which a higher burden of proof applies. Schulz is therefore inapposite to the Alabama courts' finding that the Petitioner failed to produce sufficient evidence to create a genuine issue of fact on the material element of defect.

It is significant that, contrary to Petitioner's assertions noted above, the Alabama Supreme Court did not base its decision on the Petitioner's failure to identify the specific substance causing his allergic asthma. Rather it based its ruling on the fact that Petitioner was "unable to identify *any* substance aboard *any* of defendants' vessels as the causative agent of his allergic asthma." (Appendix A to Petitioner's brief, p. 30 (emphasis added)). The court did not hold that the Petitioner was required to identify just *one* specific substance as *the* cause of his ailment. Rather it found against the Petitioner because he could not name so much as *one* chemical as the possible cause of his ailment or demonstrate when he encountered it or on what boat or under what circumstances. The Alabama Supreme Court was correct in so finding, and the petition for certiorari must be denied.

The Petitioner also misrepresents that the Alabama courts required him to establish notice on part of the Repondents to prevail on the *unseaworthiness* claim. (See, generally, Petitioner's brief, pp. 17, 18). This is demonstrably false. The notion of notice in the lower court's ruling, by express and unmistakable terms, applied

solely to Petitioner's *negligence* claim, not to his claim on the warranty of seaworthiness. The ruling of the Alabama courts is as follows:

> *[O]n his claim for negligence* . . . if [Petitioner] cannot identify any substance aboard any of [Respondents'] vessels as the cause of his alleged injury, he cannot prove that [Respondents] knew or should have known of the presence of any substance aboard their boats which was supposedly harmful to the [Petitioner].

Appendix A to Petitioner's brief, pp. 30, 31 (emphasis added). This passage clearly illustrates that the Alabama courts correctly attached the concept of notice to Petitioner's claim of negligence and not to his claim for unseaworthiness. Only in this appropriate context, and nowhere else, is the concept of notice incorporated. The very text of the lower courts' ruling prevents Petitioner from legitimately contending otherwise.

It must be noted here that the opinions of Dr. Lorino, on which Petitioner almost solely relies in his petition, were opinions expressed by him in an affidavit dated June 17, 1993, *one day after the trial court granted Respondents' motion for summary judgment.* The summary judgment was granted June 16, 1993. (Petitioner's brief, p. 33). Respondents submit that it is, at best, grossly improper for the Petitioner to place his reliance on an affidavit which was not before the trial court when judgment was entered especially without disclosing such fact to this Court. It is also improper, we submit, particularly under such circumstances, to refer to the "testimony" of Dr. Lorino supposedly entitling Petitioner to a grant of certiorari without revealing that this "testimony" is contained in his tardy affidavit, and not his deposition.

But let us ignore for the moment the fact that Petitioner filed this affidavit *after* the trial court's ruling, and let us also ignore the fact that the Alabama courts were, for this reason, entitled to disregard the affidavit altogether. Examining the affidavit itself, we find that it creates no issue fact whatsoever.

Looked at in its entirety, the thrust of the affidavit is essentially that the various "dusts, mists and fumes" (R. 280) to which Petitioner was exposed caused his occupational asthma. This *might* be sufficient if this were merely a workers' compensation suit. (See Section V below). But it is not a mere compensation suit. Rather it is one for damages and one in which, for a plaintiff to prevail, he must show not merely that his condition was employment related but, rather, that his condition resulted from some defect or defective condition aboard one of the boats on which he worked. This was the thrust of the trial court's ruling. It was premised on Petitioner's inability to show that *any defective condition* aboard one of the Chouest boats was responsible for his condition.

The affidavit, for instance, says that Mr. Short's allergic condition "resulted from his exposure" to various "dusts, mists and fumes." (R. 280). Dr. Lorino states that "[s]everal of the chemicals" used on various Chouest boats "are allergens known to cause occupational asthma." (R. 280-282). The affidavit is replete with similar statements. But these statements miss the point. A fair analysis of the trial court's findings shows that its ruling was based not on the Petitioner's inability to show that some chemical, dust or mist caused his condition (all substances in nature are chemicals) but that some *defective condition* aboard a Chouest boat caused his allergic illness.

The trial court held in an unassailable proposition of

law that:

> For plaintiff to prevail on his claim for unseaworthiness, plaintiff must establish that defendants' vessels or appliances were in some manner defective, i.e., not reasonably fit for their intended use.

Appendix A to Petitioner's brief, pp. 4, 5. Petitioner now, as before, seeks to obfuscate the issues in this case and convince this Court that, in order to prevail, he need only show that sometime, somewhere, a chemical he inhaled caused an allergic (idiosyncratic) reaction on his part. This *might* work if this were indeed a workers' compensation action as the Petitioner has represented to this Court. But Petitioner's action is not governed by workers' compensation principles; it is governed by the principles of the maritime law and under these principles the Petitioner failed to raise any issues of material fact to be presented to a jury.

To be sure, the affidavit (which appears to have been prepared by Petitioner's counsel for Dr. Lorino's signature *after* the Circuit Court ruled and entered judgment) stated that many of the chemicals used in the offshore industry "are not harmless chemicals." (R. 283). But being "not harmless" does not equate to "defective." It does not raise an issue as to a material fact because a shipowner is not "obligated to furnish an accident-free ship." He is not required to furnish a hazard-free or "harmless" ship. Rather, he is required to furnish only a vessel "reasonably fit" for its intended use. Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 317 (1964) (quoting Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960)). He is not required to furnish a boat altogether free of "not harmless substances." The Petitioner here seeks to argue that merely because the Plaintiff *might* have contracted his allergic condition from a "chemical" he chanced to

encounter aboard a Chouest boat, he is ipso facto entitled to recover. Such *might* be the law governing workers' compensation claims but it is not the law governing maritime actions for damages under the Jones Act for negligence or the general maritime law for unseaworthiness.

The Court will also note that the trial court's decision was supported by an *alternative* basis which was adopted by the Alabama Supreme Court. On the basis of undisputed evidence, and assuming arguendo that Petitioner suffered from the asthmatic condition alleged, the trial court held that because the Petitioner had an abnormal immune system, and because his response to the chemicals to which he might have been exposed was idiosyncratic in nature, the actual cause of his problems was his abnormal immune system, not the substances to which he might have been exposed. (See Appendix A to Petitioner's brief, pp. 26-28, 31, 32.) Both lower courts made that finding in unequivocal language:

> If the plaintiff does in fact suffer from occupational asthma, then his condition was caused by an abnormal, i.e., allergic response of the plaintiff's body which occurred as a result of exposure (at times unknown) to an allergen (which is also unknown).

See Appendix A to Petitioner's brief, pp. 27, 28. The holding is a factual one dealing with causation, not a legal one improperly importing products liability law into admiralty.

Yet nowhere does Petitioner attempt to come to grips with the fact that the condition for which he seeks damages is an allergic reaction to an unidentified substance -- not an illness caused by some defective condition aboard Respondents' boats. Thus, even if we assume that

Petitioner contracted asthma as a result of inhaling a "chemical" while at work, he still cannot recover because, as demonstrated by the uncontradicted testimony of both Petitioner's physician, Dr. Lorino, and Respondents' consultant, Dr. Richard deShazo, the actual cause of the Petitioner's disorder is an abnormality of his own immune system, not a defective or hazardous condition aboard a boat on which he worked.

Dr. Lorino himself admitted that occupational asthma is "an allergic form of asthma which is triggered by an abnormal immune response in the patient." (R. 437, 438) The cause of the Petitioner's problems, by Dr. Lorino's admission, is thus the Petitioner's own defective immune system, not a defective condition aboard a boat.

Occupational asthma is an extremely rare condition. The trial court found, based on the testimony of Dr. Lorino and the affidavit of Dr. deShazo, that occupational asthma "is found in only an exceedingly small percentage of the population." (R. 522). The court went on to find that "it is uncontested that occupational asthma is a disease which affects, at most, only one-quarter of one percent of the population." (R. 522).

It follows that if the reaction experienced by the Petitioner is one which would be experienced by less than one-quarter of one percent of the population, then the condition which triggers it cannot be characterized as a defect -- which, as previously demonstrated, is an absolute necessity for a finding that a vessel or its equipment is unseaworthy.

Respondents submit, therefore, that the trial court and the Alabama Supreme Court scrupulously followed established maritime law principles in deciding this case and correctly resisted the "unique law" which Petitioner

sought to force on it from the beginning. It correctly held that under the law of admiralty, the Petitioner must show the existence of some defect aboard one or more of the boats on which he worked and that this defect (not some abnormality of his immune system) caused the ailment for which he now seeks to recover. And it correctly held that he had failed to meet these burdens placed on him by the "Federal Jones Act and General Maritime Law."

The ruling of the Alabama courts is based upon sound and settled principles of maritime law. The petition is due to be denied.

V.

THE PETITIONER MISREPRESENTS THE NATURE OF HIS CLAIMS.

The Petitioner blatantly misrepresents the nature of his claims, thereby incorporating into his petition an improper standard of liability. For this additional reason, the petition should be denied.

The Petitioner misrepresents to this Court that his claims based on the Jones Act and on the general maritime warranty of seaworthiness are "his seaman's workers [sic] compensation remedy." (Petitioner's brief, p. 17). Petitioner made the same misrepresentation to the Alabama Supreme Court:

> This is an action by a seaman seeking a seaman's workers [sic] compensation remedy, i.e. an action based upon unseaworthiness and the Jones Act . . .

Petitioner's Application for Rehearing to the Alabama Supreme Court, p. 3. As Petitioner must be well aware,

this statement is false. Neither the Jones Act nor the general maritime warranty of seaworthiness are analogous to workers' compensation. As the court in Alrayashi v. Rouge Steel Co. explained, it is the provision of maintenance and cure, not damages under the Jones Act or the seaworthiness warranty, which amounts to a seaman's workers' compensation remedy:

> An action for maintenance and cure is general maritime law's equivalent of workmen's compensation . . . Maintenance and cure is a claim independent of a claim under the Jones Act or a claim of unseaworthiness.

702 F. Supp. 1334, 1338 (E.D. Mich. 1989).

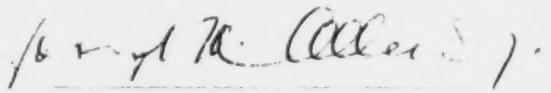
The foregoing is noted to make clear that the elements of the Petitioner's actual causes of action required him to prove fault under the Jones Act and the existence of a defect under the unseaworthiness claim. The Petitioner's allusions to workers' compensation are wholly immaterial and constitute a misrepresentation of the legal standard which governed his action. The petition is therefore due to be denied.

CONCLUSION

This petition fails to present any legal question for resolution. Further, the petition fails to establish that the nominal questions presented for review were properly raised and disposed of below and, for that reason, fails to show to this Court that it has jurisdiction to review the judgment on a writ of certiorari. Finally the petition would have this Court evaluate a factual finding. This is clear from the fact that the ruling of the Alabama courts is based on eminently correct principles of maritime law.

For these reasons, the Respondents request that the petition be denied.

Respectfully submitted,



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Supreme Court, U.S.
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NO. 93-2034

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ANTHONY SHORT

Petitioner

v

EDISON CHOUEST OFFSHORE, INC. ET AL

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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6 pp

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ARGUMENT

1. The Issue Was Presented Below

Respondent argues that Petitioner's attorney failed to properly express the questions presented or to establish that the questions presented were raised in the lower court. The very issue presented here, i.e. that the Courts of Alabama failed in this case to apply proper maritime law principles was presented and argued below. Attached hereto as Exhibit A, are pages 31 through the middle of page 46 of the Appellant's brief filed with the Alabama Supreme Court wherein such argument was advanced.

2. What Standard of Proof Was Required By the Court Below

Respondents argue that Petitioner is misrepresenting to this court the ruling of

the court below.[1] Respondents take the position that the law applied by the court below did not require Mr. Short to identify the single chemical substance which caused or triggered his occupational asthma. Respondents contend the courts below only required petitioner to make a showing of evidence of a defect.

If the Alabama trial court and Supreme Court did not require Mr. Short to prove which specific chemical compound triggered his occupational asthma, then why was the motion for summary judgment granted? Large quantities of breathable chemicals in areas of a vessel where the crew works without proper respiratory protection is a defect. Davis v. Odeco,

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[1]The entire opinion of the court below was copied as Appendix A to Petition for Writ of Certiorari.

Inc., 18 F.3rd 1237 (5th Cir. 1994). Where the exposure to such chemical dusts causes injury, there is a cause of action.

What did the court require Mr. Short to prove? Paragraphs 1 through 4 of its Findings of Fact acknowledge that Mr. Short was a seaman who as a result of 15 years of exposure to chemicals aboard respondents' vessels developed occupational asthma.[2] The court at that point could have found that there was sufficient evidence for the case to go to the jury under the Jones Act and the General Maritime law.

Notwithstanding the above, the court then stated in paragraph 5 of the Findings of Fact:

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[2]The very diagnosis of "occupational asthma" is a diagnosis that the asthma is attributable to conditions in the workplace.

> "Significantly, neither the plaintiff nor his physician can identify any substance aboard defendants' vessels which caused this condition. Neither can the plaintiff or his physician identify the time or place of the plaintiff's exposure to any such unidentified substance. In fact, Dr. Lorino stated in his deposition that he did not 'know of any specific substances or names that the plaintiff was exposed to.'"

The court in paragraph 5 of its Conclusions of Law stated:

> "the plaintiff is unable to identify any substance aboard any of defendants' vessels as the causative agent of his asthma and is thus unable to identity the instrumentality which caused his alleged injury."

The door was then shut on Mr. Short's case in paragraphs 6 and 7 of the court's Conclusions of Law when the court held that since he could not identify the substance that caused his occupational asthma, he necessarily could not show a defect and thus he had no remedy.

Chemical dusts, etc. in a workplace

with no suitable respiratory protection provided for seamen is certainly a defect that renders a vessel unseaworthy. Since the court found such exposure and found that such exposure caused or contributed to Mr. Short's asthma, then the only explanation for the ruling is that the Alabama Courts erroneously concluded that Mr. Short had to identify a specific substance as the causative agent.

3. The Defect

During his 15 year employment with respondents, Mr. Short was exposed to heavy concentrations of various chemical dusts, fumes and mists (including those listed in Mr. Short's affidavit, attached hereto as Exhibit B) all without proper respiratory protection. That exposure, according to his treating physician was the cause of his occupational asthma.

The question presented here and the question presented below is whether the above uncontradicted facts state a cause of action under the General Maritime law or the Jones Act.

Why are not large quantities of chemical dust "a substance." Why are the dozen or more specific chemicals listed in Mr. Short's affidavit not "identified substances" to which he was exposed. Why was the affidavit of Safety Expert Mallory J. Lessard marked as Exhibit C not considered or commented on. Why did the court disregard the opinion of treating physician Dr. Gaeton Lorino, (affidavit attached hereto as Exhibit D)[3] who stated

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[3] The affidavit of Dr. Gaeton R. Lorino, as well as his deposition testimony, was before the Supreme Court of Alabama, as shown by the court's order (attached hereto as Exhibit E) of February 4, 1994, denying respondents' motion to

in deposition testimony that exposure to the various chemical dusts, mists and fumes (substances) during Mr. Short's employment was to a reasonable degree of medical certainty the cause of his asthma.

The reason the courts below did not consider the volume of evidence showing chemical exposure with no respiratory protection was that the courts applied improper law to this case, i.e. products liability law and a legal requirement that Mr. Short must identify the chemical that triggered his asthma.

The exposure to the large quantities of chemicals without proper respiratory protection which resulted in occupational asthma, all as set out above, created a jury question under the General Maritime

---

strike such affidavit.

law and/or the Jones Act. Certiorari should be granted in order to consider if the unique law of Alabama which resulted in summary judgment in this case is to be allowed to stand as the maritime law applicable to seamen's cases brought in Alabama courts.

4. Summary

The requirement of the Alabama Courts that a seaman exposed for 15 years to large quantities of known and unknown chemicals without respiratory protection, which exposure caused his occupational asthma, must identify a single specific substance, time, and place, is a departure from recognized Admiralty law principles. All Mr. Short needed to do was to show that the chemicals to which he was exposed without proper respiratory protection caused or contributed in some manner to his illness.

The alternative application of product liability law by the court below is improper, in that there is a large viable body of maritime law to apply. Product liability law is founded in contract and does not consider the well-established Admiralty law principle that a vessel owner takes his crewmen as he finds them; that the crewman does not assume the risk of exposure to various chemicals; and that notice or knowledge is immaterial when there is a condition onboard which causes injury to a seaman.

In view of all of the above, this Court should accept certiorari, and if this Court concludes that the courts of Alabama were in error in requiring Mr. Short to prove an impossibility and in applying product liability law to Mr. Short's General Maritime law and Jones Act case,

then the case should be reversed and remanded, with instructions that the affidavits, depositions and documents before the court below created jury questions which require a jury trial with the jury to be instructed as to proper and applicable law for this Admiralty case.

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APPENDIX A

BRIEF OF APPELLANT ANTHONY SHORT
IN THE SUPREME COURT OF THE
STATE OF ALABAMA, PAGES 31 THROUGH 46

SEAWORTHINESS REMEDY

The Court below apparently ignored the fact that Mr. Short is a seaman with a cause of action for unseaworthiness. There was a factual question as to whether the ehemicals that he breathed were harmless or harmful. There was substantial evidence that they were harmful. Dr. Lorino testified that the various chemicals caused Mr. Short's illness. That testimony of itself is sufficient to go to the jury on causation and unseaworthiness. There was no evidence tendered by Edison Chouest that the chemicals breathed by Tony Short were in fact harmless or that they did not cause the occupational asthma. The question of whether the chemicals were harmful or

harmless, or did or did not cause this illness created a factual issue as to unseawothiness.

The defendants owed to Mr. Short an absolute and continuing obligation to provide him with a safe place to work. Mahnich v. Southern Steamship Co., 321 U. S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944). The vessels on which he worked were unseaworthy in that during his employment he was exposed to noxious chemical dusts, vapors, fumes, etc. The vessels did not have aboard for his use proper respiratory protective devices. The vessels did not have vacuum cleaners or sweepers for the tanks which required the tanks to be broom swept, thus exacerbating the dust, fume and vapor situation.

The liability of the Edison Chouest companies under the doctrine of unseaworth-

iness does not rest upon fault or negligence. Johnson v. Offshore Express, Inc., 845 F.2d 1347 (5th Cir. 1988); Hussein v. Isthmian Lines, Inc., 405 Fed.2d 946 (5th Cir. 1968). Unseaworthiness is a condition and how that condition came into being - whether by negligence or otherwise - is quite irrelevant to the owner's liability for personal injuries resulting from it. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1970). it does not matter whether defendants knew or should have known that the chemical dusts to which they exposed Mr. Short were harmless or harmful - actual knowledge is not a factor. The seaworthiness concept shifts the risk that the dust which Mr. Short might breathe might trigger asthma from the seaman, Mr. Short, to the shipowners, the Edison

Chouest companies. Waldron v. Moore-McCormack Lines, Inc., 368 U.S. 724, 728 (1966).

> "The warranty of seaworthiness in personal injury cases essentially depends upon neither common law tort nor contract concepts. Demas v. LeHigh Valley Railroad, 234 Fed.2d 151, 153 (2nd Cir. 1956). Instead, while the seaworthiness doctrine is comprised of both tort and contract elements, it is a creature of twentieth-century judicial policy concerning risk distribution in the shipping industry. Delome v. Union Barge Line Company, 444 Fed.2d 225 (5th Cir. 1971). The seaworthiness warranty is essentially a species of liability without fault." Delome, at 229.

Under the unseaworthiness cause of action the shipowner is required to have in place safety procedures to require use of necessary protective devices. Edison Chouest had no such procedures. Weeks v. Alonzo Cothron, Inc., 466 F.2d 578 (5th Cir. 1972). The use of defective or inadequate equipment or gear not reasonably

suited for the purposes for which it was used, such as the improper dust mask furnished to plaintiff, rendered vessels upon which plaintiff worked unseaworthy. Usher v. Luckenbach Overseas Corp., 400 U.S. 494, 491 S.Ct. 514, 517-18, 27 L.Ed.2d 562, 567 (1971). The presence of chemical dust and fumes in the vessels' working area makes the vessel unseaworthy. Smith v. Ithaca Corporation, 612 Fed. 2d 215 (5th Cir. 1980). Edison Chouest was thus required to furnish a vessel with work areas free from the dust which caused the illness to the plaintiff. Having presented to the court substantial factual evidence that Chouest did not do so, the question of general maritime law liability was for the jury.

TONY SHORT'S JONES ACT REMEDY

The Jones Act is remedial and welfare legislation which created rights to the

seaman for damages arising from maritime torts and was intended to give protection to the seaman and those dependent upon his earnings. Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 375, 77 L.Ed. 368, 373, 53 S.Ct. 173 (1932). The Jones Act remedy is quite broad and Jones Act negligence as well as unseaworthiness for that matter can be a per se result of regulatory violations of the type set out in Mr. Lessard's affidavit (App. 2). Smith v. Transworld Drilling Company, 772 F.2d 157 (5th Cir. 1985). The safe place to work concept is not only a part of the unseawothiness remedy but the vessel owner is deemed negligent if he fails to exercise reasonable care to maintain a reasonably safe work environment. Ober v. Penrod Drilling Co., 726 Fed.2d 1035 (5th Cir. 1984); Ceja v. Mike Hooks, Inc., 690 Fed.2d

1191 (5th Cir. 1982). There was evidence from which a jury could have concluded that a chemical dust laden atmosphere was not a reasonably safe place to work.

Under the Jones Act the defendant Edison Chouest companies must bear the responsibility for any negligence, however slightly it played a part in producing plaintiff's injury. Landry v. Oceanic Contractors, Inc., 731 Fed.2d 299, 302 (5th Cir. 1984).

> "Under the Jones Act cases a jury is entitled to make permissible inferences even from unexplained events. Martin v. John W. Stone Oil Distributing Co., 819 Fed.2d 547, 549 (5th Cir. 1987).

In addition to all of the above, the Jones Act is to be liberally construed in favor of the injured seaman who is a ward of the court with a featherweight burden of proof. Spinks v. Chevon Oil Co., 507 F.2d

216 (5th Cir. 1975).

The facts as submitted to the Trial Court in opposition to the motion for summary judgment were not only sufficient to defeat such motion, but were sufficient, particularly under the liberal construction required, to create a prima facie case for plaintiff Tony Short on his Jones Act and unseaworthiness remedy. The court was in error in concluding that plaintiff could not offer any evidence in support of either such remedy and the court was in error in granting the motion for summary judgment.

CAUSAL CONNECTION REQUIREMENTS

The Court Below, in spite of the medical testimony to the contrary (R.450, 451), concluded that Tony Short had to bring to the court a single specific chemical as being the undisputed cause of

his asthma (R.524). Not only did Dr. Lorino state that such a burden is a medical impossibility, but he stated in his deposition that such was not required for the diagnosis nor for the finding that the occupational asthma was a result of ship-board exposure (R. 448, 450-451). There was no medical evidence to the contrary. Even had there been medical testimony to the contrary it would have only created a factual issue for resolution by the jury.

Even testimony of a mere possibility of a causal relationship between an injury and an unseaworthy condition or Jones Act negligence would have been sufficient for the case to go to the jury. The very definition of "occupational asthma" as being a form of asthma caused by exposure on the job together with the diagnosis of such creates a factual question (R. 436).

In Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 4 L.Ed.2d 142, 80 S.Ct. 173 (1959) the court concluded that where the plaintiff claimed that his preexisting lung condition had been aggravated as a result of exposure onboard and while none of three medical witnesses were willing to definitely attribute the aggravation of plaintiff's illness to the incident in question, they each indicated that it was a possible or probable cause. The court upheld the jury verdict, stating that:

> "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause***. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were

> entitled to take all circumstances, including the medical testimony into consideration." Id 361 U.S. at 109.

In a Jones Act case the plaintiff need not make a showing that the employer's negligence was the sole cause; there must only be some showing that a causal relationship existed. Mayhew v. Bell Steamship Co., 917 Fed.2d 961 (6th Cir. 1990). It is not at all necessary that a single positive causative agent be identified in this case. The fact that a doctor may find that Mr. Short's condition is idiopathic, that is, he cannot point to a specific causative agent, is not controlling. Harrison v. Flota Mercante, 577 Fed.2d 968 (5th Cir. 1978). Notwithstanding that the case law says Mr. Short did not have to prove which single chemical triggered his asthma (an impossible burden), he did tender testimony

by Dr. Lorino that to a reasonable degree of medical certainty Tony Short's occupational asthma is a result of chemical dust exposure on the Edison Chouest companies' boats (R.454-455).

A well known text states:

> "It does not seem to be overstating *** much, if at all, to conclude that the plaintiff makes his prima facie case by showing that he was injured and that the injury could have been caused by the negligence of the shipowner (in furnishing defective equipment) ***. Apparently, the only way in which a defendant can win a directed verdict is to establish by indisputable and uncontroverted evidence both the cause of the accident and its own freedom from negligence." The Law of Admiralty, 2d ed., Gilmore & Black, p. 378.

There was sufficient evidence of causation to have allowed that issue to go to a jury.

THIS IS NOT A MANUFACTURER'S LIABILITY CASE.

The court concluded in granting summary judgment that Tony Short could not recover because of his unusual susceptibility to asthma. That may be a valid point of discussion in a products liability case, but in a tort case or unseaworthiness case or Jones Act case, a tortfeasor takes his victim as he finds him:

> "If the victim is highly vulnerable, that is the tortfeasor's bad luck; there is no discount to average damages. This is a thoroughly sensible principle, by the way. If a tortfeasor never had to pay more than the average victim's damages, victims as a class would be systematically undercompensated and tortfeasors as a class therefore systematically underdeterred, because victims with above average injuries would get their damages cut, while victims with below average injuries would not get an offsetting increase." Lancaster v. Norfolk & Western Railroad Co., 773 F.2d 807, 822 (7th Cir. 1985).

The Lancaster case is an FELA case, which act was incorporated by reference into the Jones Act, U.S.C.A. § 688. Alabama is in agreement:

> "It is the law in Alabama that when one negligently injures another so as to aggravate a pre-existing condition, the negligent actor is liable for all injuries proximately resulting therefrom, even though a normal person's injury would have been much less severe. This is in agreement with the general rule applied elsewhere." Henderson v. United States, 328 Fed.2d 502 (5th Cir. 1964). See also Norris, The Law of Seamen, 4th ed. Vol.2, §30.41 and Gamble, Alabama Law of Damages 2nd ed. p. 426.

The cases under the Alabama Workers Compensation Act also provide that the employer takes his employee subject to his physical condition when he enters his employment. Allen v. Metro Contract Services, Inc., 421 So.2d 1289 (Ala.Civ. App. 1982).

What then of the court's findings that the Chouest companies were not responsible because Mr. Short may have had a predisposition to asthma unlike other of the defendant's employees? The defendant Edison Chouest companies took Tony Short with his predilections toward asthma, if any, and if the conditions onboard their vessels or their negligence in whole or in part, influenced or aggravated or caused plaintiff asthmatic conditions, the defendants are liable therefor. The fact that Tony Short was susceptible to asthma rather than having a weak back or a thin skull makes no difference.

There are numerous cases in which employees have recovered from employers for aggravation of asthmatic conditions. In Curry v. United States, 327 Fed.Supp. 155 (N.D. Calif. 1971) defendant died from a

preexisting asthma condition as a result of polluted and noxious air in the engine room of a vessel. The court found liability notwithstanding the preexisting condition and applied in an Admiralty context asthma case the general rule that the tortfeasor takes his asthmatic victim as he finds him.

In Thompson v. Wells Lamont Corporation, 362 So.2d 538 (Miss. 1978) plaintiff recovered as a result of an allergic reaction to dust and lint. In Jenkins v. Ogletree Farm Supply, 291 So.2d 560 (Miss. 1974) plaintiff's asthma was aggravated as a result of inhaling dust particles, allowing a recovery against his employer. For years, Tony Short breathed, among other things, cement dust. In Concannon v. Oregon Portland Cement Co., 447 P.2d 290 (Oregon 1968) the plaintiff breathed cement dust during a period of one week while

working at a cement plant which rendered him totally disabled as a result of asthma, for which recover was allowed. The Michigan case of Tolottson v. Penn-Dixie Cement Corporation, 209 N.W.2d 611 (Mich. 1973) was another case where cement dust had caused the plaintiff's disability for emphysema for which he was allowed recovery. In Lang v. Birch Shipping Company, 523 Fed.Supp. 1112 (S.D.N.Y. 1981) the plaintiff was exposed to grain dust on the vessel where he was a seaman, from which exposure he developed chronic asthma. His theory was the same as Tony Short's, i.e. the shipping company failed to provide a safe place to work with adequate masks or other protective devices. The plaintiff recovered.

The application of products liability law to a seaman's personal injury case was

improper. The Kentucky law case of Gordon v. Proctor and Gamble, 789 F.Supp. 1384 (W. D. KY 1992) relied on by the court is totally inappropriate. None of the unique Admiralty law requirements stated above or set out below are part of a products liability warranty claim.

ASSUMPTION OF RISK

The Judge below in effect stated that the risk of a debilitating injury from unknown chemicals to which plaintiff was subjected while in the employ of the defendants was a risk to be borne by the plaintiff seaman and not the employer shipowner. That analysis of the law is incorrect. Assumption of risk is not a defense to a claim of unseaworthiness. Villers Seafood Co. Inc. v. Vest, 813 Fed.2d 339 (11th Cir. 1987) nor is assumption of risk a defense under the

Jones Act. Bobb v. Modern Products, Inc., 648 Fed.2d 1051 (5th Cir. 1981). Section 4 of the Railroad Employees Act, 45 U.S.C.A. § 53, abolished the defense of assumption of risk. Therefore, assumption of risk - a common law affirmative defense - is not available as a defense to an action brought by a seaman. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 83 L.Ed. 265, 59 S.Ct. 263 (1939); Ceja v. Mike Hooks, Inc. 690 Fed.2d 1191 (5th Cir. 1982). In view of the above it was improper to place the risk upon Mr. Short that some unknown chemical encountered during his employment as a seaman might result in injury to him. By statute and by the general maritime law, the risk of such injury is transferred over to the employer, the Edison Chouest companies.

NOTICE OF DEFECT NOT REQUIRED

The Court Below concluded that before Tony Short could recover he had to show that the Edison Chouest companies had notice of the dangerous propensities of the exact chemical which triggered Tony Short's problem. That conclusion is contrary to the applicable law.

Notice of a dangerous condition or negligence in regard to that condition is immaterial in an action against a vessel owner for unseaworthiness under the general maritime law. Karvelis v. Constellation Lines, S.A., 806 Fed.2d 49, (2nd Cir. 1986) cert. den. 107 S.Ct. 1891, 481 U.S. 1015, 95 L.Ed. 498. A shipowner's lack of knowledge of a condition which renders a vessel unseaworthy is not a defense. Claborn v. Star Fish & Oyster co. Inc., 578 Fed.2d 983 (5th Cir. 1978). The duty to provide a seaworthy vessel is non-delegable and per-

tains to latent as well as patent defects and neither ignorance nor due diligence will serve as an adequate defense. Clevenger v. Star Fish & Oyster Co. Inc., 325 Fed.2d 397 (5th Cir. 1963).

> "Negligence or notice of defective condition is not a necessary factor to sustained the trial court's decision. As Judge Hincks said in Poygnant v. United States, 2nd Circuit, 1955, 225 Fed.2d 595, 596: 'Under the general maritime law an injured seaman, once he proves an injury caused by an unseaworthy condition, may recover without proof of negligence on the part of the vessel's owner. *** Since the inquiry in unseaworthiness cases is not directed to the issue of the owner's fault, it follows that prior notice, actual or constructive, of the unseaworthy condition is not essential to a cause of action based on that doctrine." Sprague v. The Texas Company, 250 Fed.2d 123 (2nd Cir. 1957).

The Edison Chouest companies cannot avoid their absolute duty by saying that they do not know what caused the particular

injury or suggesting in effect that it was an Act of God. Marshall v. Ove Skou Rederi A/S, 378 Fed.2d 193 (5th Cir. 1967).

Notwithstanding Edison Chouest's protestations that it did not know of any dangerous chemicals carried onboard its vessels, it should have known such. The case of White v. Rimrock Tidelands, Inc., 414 Fed.2d 1336 (5th Cir. 1969) involved an injury to a seaman from an exposure to drilling mud. There the court found that the absence of safety equipment for use by the seaman directed to enter the tank containing caustic drilling mud amounted to unseaworthiness. The fact that safety equipment may not have been provided by other drillers in the business was not controlling. There have been other injuries to seamen as a result of exposure to drilling mud while cleaning mud tanks,

an operation that Tony Short did on a regular basis.

The Court was incorrect in concluding that Tony Short could not recover unless he could prove that defendants knew of the specific chemical that caused his injury.

DUTY TO INSPECT

Edison Chouest has testified that it had no knowledge of the chemicals carried onboard its vessel and it made no effort whatsoever to determine such (R.312-313). Notwithstanding, the court concluded that since they had no knowledge they cannot be responsible. That position is totally contrary to the applicable law. A ship-owner has an obligation to inspect his vessel for hazards. Failure to inspect a vessel for hazards is Jones Act negligence. Joyce v. Atlantic Ritchfield Co., 651 F.2d 676, 681 (10th Cir. 1981); Davis v. Hill

Engineering, Inc., 549 Fed. 2d 314 (5th Cir. 1977); Matter of Texaco, Inc., 570 Fed.Supp. 1271 (E.D. LA 1983).

The failure of the Edison Chouest companies to make any inquiry as to the type of chemicals to which it was exposing its employees while making no effort to ascertain if those chemicals were or were not harmful to their health, is a violation of its duty under the Jones Act and under the general maritime law. They cannot simply close their eyes and plead ignorance as to the work conditions onboard their vessels.

APPENDIX B

AFFIDAVIT OF ANTHONY E. SHORT

Personally appeared before me, the undersigned authority in and for the State of Alabama and County of Mobile, ANTHONY E. SHORT, who being by me first duly sworn, on oath deposes and says:

I am the plaintiff in the above captioned matter. Shortly after completing high school in Bayou la Batre, Alabama, I went to work with defendants, who operate about 30 offshore supply boats, tugs and other large vessels. I started as a deckhand in 1977 and worked my way up to Captain of 185' offshore supply boats. My entire work career of 15 years since 1977 was with the defendants and my last employment was with defendants in April 1992.

During my 15 years with the Edison

Chouest companies I was regularly exposed to, breathed and ingested heavy concentrations of mineral and chemical dust, fumes and mist. The only such exposure I have had was in connection with my employment with defendants.

For my well being and respiratory protection while onboard defendants' vessels I relied entirely upon Edison Chouest. I have no chemical education and have received no training in recognizing different harmful chemicals, minerals, acids and other compounds, vapors and fumes encountered by me on a regular basis during my employment. I frequently did not know the chemical and mineral composition of the various cargoes carried onboard my vessel and I was exposed to heavy concentrations of such mineral and chemical dusts, fumes and mists by the necessity of broom

sweeping the cargo tanks, hosing down the liquid tanks and spraying various chemicals.

During the first approximately 15 years of my employment with Edison Chouest I was provided only with paper masks of the type that comes in the box, a copy of which is attached hereto as Exhibit A. On many occasions I cleaned tanks without any mask because they were not provided by defendants. Edison Chouest had no safety program to provide proper respiratory protection to its employees. Defendants knew that I was on a regular basis exposed to heavy concentrations of various chemical and mineral dusts, fumes and mists, the chemical and mineral makeup of which I had no knowledge. During my employment with Edison Chouest I made no notes of the chemicals to which I was exposed and

undoubtedly there were many such chemicals or minerals in addition to those listed below.

During the 15 years of my employment with defendants I was regularly exposed to and breathed dust or mist or fumes from hydrochloric acid which was regularly used in an undiluted form to clean cement off the deck of the vessels, Aluminex, a corrosive aluminum cleaner the specific chemical makeup of which I do not know, various polyurethane varnishes which were applied and sanded down, various paints including multi-part epoxy paints, diesel fumes, and various other cleaning fluids and compounds used onboard the vessel. I broom swept dry bulk tanks, which required me to spend long periods of time in heavy dust atmospheres and cleaned liquid tanks by going into such tanks with a hose, which

exposed me to heavy mist and vapors from such liquids.

I regularly cleaned liquid tanks which contained oil based liquid drilling mud and water based liquid drilling mud. Drilling mud is barium sulphate, which contains various heavy metals and additives, some of which are shown on the attached safety data sheets of various additive products. The drill mud tanks had a strong chemical odor but at the time I cleaned such tanks I was not aware of the exact type of chemicals that were added. I now know that the barium sulphate, or drilling mud, that I was exposed to in both dry and liquid forms often contained formaldehyde as a fungicide.

I was also exposed to calcium chloride and calcium bromide in the liquid tanks and washed down liquid tanks that brought mud

from the rig to shore tanks, which mud contained various unknown chemical and mineral additives. I was exposed to drill mud from various manufacturers or suppliers which included Bayroid, Magcobar, Mayronne, Imco, Milchem and Halliburton. I was exposed to heavy concentrations of cement on a regular basis which would contain D-46, a defoamant that has a distinct chemical smell, the precise composition of which is unknown to me, cement blend which contains various additives, Class H Neat cement with gel which is a silicone based additive, straight gel, which is powdered silicon with other chemicals, Pharox which is a red mud with pulverized metals of various types all in a dust form, Econolite additive to the cement, as well as dust from various bagged chemicals, the composition of which is unknown to me.

The barium sulfate (drill mud) had different weights because of different additives. The average weight of liquid mud was about 15 pounds, but I have handled it with additives that carried the weight to 22 pounds per gallon. Various heavy metals were added to cement and mud in order to increase the weight and lighteners of unknown composition added to decrease the weight. I breathed dust and fumes from all the above products.

Silicate additive D-75, an alkaline chemical with a pH of 11 is listed in the attached materials data sheet as toxic to mammals. Trinity Lightwate cement D-49, to which I was exposed, contained traces of chromium, various cement additives, and silicon dioxide which is a respiratory irritant, for which special respiratory protection was required, but which I was

never furnished. The cement dust which I breathed on a regular basis, according to the attached safety data sheet, is harmful if inhaled and should not be breathed. Other chemicals that I regularly was exposed to, such as D-Air 1 Antifoam Agent, copy of data sheet for which is attached hereto marked as Plaintiff's Exhibit 39, states that inhalation may aggravate asthma and other pulmonary diseases, is a carcinogen and repeated inhalation causes respiratory irritation and pneumoconiosis, with a warning that humans should avoid creating or inhaling dust. The cement on the data sheet attached as Plaintiff's Exhibit 41 states that it contains silicon and repeated overexposure could cause chronic lung disease. The same statement is found in Exhibit 42. Econolite additive to which I was exposed on a regular basis,

described in Plaintiff's Exhibit 40, requires for safe handling a type C supplied air respirator with a full face piece, helmet or hood operated in pressure demand mode or in continuous flow mode. The safety data information states that Econolite dust should not be inhaled. I was regularly exposed to and inhaled the above.

Edison Chouest did not supply any of its vessels with air-fed respiratory protection devices nor warn its employees, nor did it warn me, of any risk of breathing any of the chemicals to which I was exposed over my 15 years of employment. Edison Chouest vessels I worked on were unseaworthy in that they contained dusty atmospheres and chemical fumes and vapors to which I was exposed without proper respiratory protection. Defendants were

negligent in failing to set up a proper safety program to provide for respiratory protection, in failing to inquire or ascertain as to what chemicals its employees were required to breath, in failing to provide vacuum tank cleaners, and in failing to provide proper respiratory protection.

Prior to 1991 I did not have asthma, had never had asthma as a child, had never any respiratory problems until the asthma symptoms developed that rapidly got progressively worse until now a great many chemicals, dusts, mists and fumes trigger asthma attacks. Prior to developing asthma as a result of exposure as set out above, I was able to do my work as required. I am now unable to work.

s/ Anthony E. Short

Subscribed and sworn to before
me this 17th day of May, 1993.
s/ Joelene E. Brown
Notary Public, State at Large

APPENDIX C

AFFIDAVIT OF MALLORY J. LESSARD

Personally appeared before me, the undersigned authority, MALLORY J. LESSARD, who being by me first duly sworn, on oath deposes and says:

I am Mallory J. Lessard, Occupational Safety Consultant. I worked for many years in the offshore oil industry and have cleaned cement and mud tanks of the type cleaned by Anthony E. Short. I have worked as Safety Director for offshore oil production companies and have set up safety programs for such companies relating to the respiratory safety of its employees. I am familiar with the various government regulations, OSHA regulations, and United States Coast Guard regulations governing dust protection and in tank cleaning operations which appear to apply by analogy

operations which appear to apply by analogy if not by direct application, and I have studied the types of respiratory protection that was available to Edison Chouest for its employees during the applicable time period. Edison Chouest took my deposition in New Orleans on May 6, 1993, and has the complete details of my background and training.

Edison Chouest was in actual violation or violated the spirit of numerous government regulations including 29 C.F.R. 1915.151-152 and 1918.86 and 93 and 1926.57 and 46 C.F.R. § 90.

For many years Anthony E. Short was exposed to various chemical and mineral dusts, fumes, mists and other respiratory irritants and exposed to particularly high concentrations of dust while cleaning cement and drilling mud tanks. Edison

Chouest vessels on which Mr. Short worked were, in my opinion, unseaworthy in that work areas on those vessels contained heavy and dangerous dust, fume and mist concentrations with inadequate respiratory protective devices provided for the protection of the crew. If Mr. Short had predisposition to allergy, then that predisposition rendered the crew unseaworthy in the face of heavy dust concentrations which after years of exposure could trigger Mr. Short's present asthmatic condition.

In my opinion Mr. Short's employers, Edison Chouest, et al, were negligent in failing to provide proper respiratory protection, in failing to set up any type of safety program to provide proper respiratory protection and in acquiring no knowledge of the chemicals or mineral respiratory irritants or pathogens to which

the crew of its vessels were exposed.

In my opinion the Comfort Mask supplied to Mr. Short during his first 15 or so years of employment with Edison Chouest was not suitable for its intended purpose and its use rendered the vessel unseaworthy and Edison Chouest was negligent in providing those masks for cleaning cement and mud tanks. Even the respiratory devices provided occasionally over the last two years of Mr. Short's employment fell far short of being suitable for use, all of which rendered the vessels upon which Mr. Short worked unseaworthy and Edison Chouest, et al neligent in failing to provide a reasonably safe place for Mr. Short to work. Allowing a crew to broom sweep dust tanks with knowledge that the crew was doing so without providing the crew with adequate lung protection, created

an unsafe environment that Edison Chouest should have known was unsafe and that providing of a dust mask rather than a respirator exhibited conduct that could be considered as reckless disregard for the safety of its employees and a reckless and willful violation of well known safety standards.

s/ Mallory J. Lessard

Subscribed and sworn to before
me this 18 day of May, 1993.

s/ S. H. Schell

Notary Public

APPENDIX D

AFFIDAVIT OF GAETON D. LORINO

STATE OF ALABAMA

COUNTY OF MOBILE

Personally appeared before me, the undersigned authority in and for said county in said state, GAETON D. LORINO, being by me first duly sworn, on oath deposes and says:

I am Gaeton D. Lorino, M.D., Board Certified and Licensed by the State of Alabama, specializing in pulmonary medicine, and I practice at the offices of Mobile Diagnostic Center, 6701 Airport Blvd., Suite A-101, Mobile, Alabama. Anthony Short has been my patient since early 1992. Anthony Short has been diagnosed by me as having Occupational Asthma, which asthma resulted from his exposure to heavy concentrations of various

chemical dusts, mist and fumes, during the 15 years that he worked on various offshore supply boats in the employ of Edison Chouest Offshore, Inc. or ns associated Edison Chouest company.

My deposition was taken on the 2nd day of April, 1993, in a lawsuit pending in the Circuit Court of Mobile County by Anthony Short seeking compensation from his employer. In my deposition I testified that it was my opinion to a reasonable degree of medical certainty that Anthony Short has occupational asthma caused by his exposure to various chemical dusts, mists and fumes while working on boats. In the history that I have from Mr. Short he cleaned dry and liquid caro tanks during the 15 years that he worked offshore with Edison Chouest without proper respiratory protection and was exposed thereby to heavy

concentrations of chemical dusts and mists. I have reviewed the affidavit signed by Mr. Short on May 17, 1993, which affidavit, together with several material safety data sheets attached hereto, give a nonexclusive listing of the various chemicals and types of chemicals to which Tony was exposed over his 15 years employment with Edison Chouest companies. Several of the chemicals listed and to which Mr. Short was exposed are allergens known to cause occupational asthma and many of the chemicals listed in Mr. Short's affidavit and as shown on the safety data sheets could trigger asthma in anyone exposed to high concentrations of such chemicals over an extended period of time such as the time Mr. Short worked on offshore vessels.

In my opinion the materials to which Mr. Short was exposed during the 15 years

that he worked for Edison Chouest companies did cause Mr. Short to develop Occupational Asthma. The exposure to heavy concentrations over a long period of time to the materials listed in Mr. Short's affidavit of May 17, 1993, and the safety data sheets attached thereto, would, in my opinion, cause respiratory problems or result in damage to a person's respiratory system which may lead to a number of debilitating conditions, including occupational asthma. Exposure to such products in heavy concentrations without proper respiratory protection would, in my opinion, create an obvious danger of respiratory damage to employees so exposed and in my opinion, an employer should have known that such exposure was danagerous to its employees and could cause respiratory illness or asthma.

The exposure of Anthony Short to a wide range of chemical respiratory irritants and allergens over a long period of time was the cause of his occupational asthma. No one single chemical can be singled out as "the cause" of such occupational induced asthma, although the list of chemicals contained in Mr. Short's affidavit contains several, such as formaldehyde, which are known to trigger asthma, and are known to have caused occupational asthma. It is the totality of the exposure over a period of years to the large quantity of various known and unknown chemicals which resulted in Tony's occupational induced asthma and in my opinion it would be impossible to determine the exact chamical that triggered his problem, if there was just one. It could have been many chemicals, or combinations of such

which triggered his occupational asthma.

Various chemicals listed in Mr. Short's affidavit and the safety data sheets attached thereto are not harmless substances if breathed over a period of time in heavy concentration. In my opinion, any of the substances listed in such affidavit and data sheets are hazardous if the dust and mist of such are inhaled over a period of time. Mr. Short's present condition is not the result of a single allegeric reaction to a subtance, but is the result of his exposure to heavy concentrations of various chemicals over a long period of time. The various chemical dusts, mists, or any one of them, to which Anthony Short was exposed in the course of his employment with Edision Chouest companies was the causative agent of his occupational asthma, and that opinion is

clearly stated in my April 2, 1993 deposition.

s/ Gaeton D. Lorino

Subscribed and sworn to before
me this 17 day of June, 1993.

Sidney H. Schell

Notary Public

APPENDIX E

IN THE SUPREME COURT OF ALABAMA

February 4, 1994

1921522

Anthony Short v. Edison Chouest Offshore, Inc. et al

(Mobile Cir.Ct.No.: CV-92-001715)

NOTICE

Motion to strike invalid authority and motion to strike affidavit of Gaeton Lorino are denied.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out aas same appear(s) of record in said Court.

Witness my hand this 4th day of Feb. 1994.

s/ Robert G. Esdale
Clerk, Supreme Court of Alabama